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WATER COUNCIL

Docket No. 03-10-WC

Appeal of the Conservation Law Foundation
In Re: Water Quality Certificate No. 2003-001

MOTION FOR REHEARING

NOW COMES the Conservation Law Foundation (CLF) and respectfully moves pursuant to WC 203.29 for rehearing. In support of this motion, CLF states:

1. On November 9, 2005, the Water Council (Council) held a hearing on the above-captioned appeal, which challenges a Section 401 Water Quality Certification (WQC) granted by the Department of Environmental Services (DES) for the proposed construction and operation of a residential development project in Greenland. By decision dated January 30, 2006, the Council denied CLF's appeal.
2. The Council erred as a matter of law by denying CLF's appeal, and affirming DES's decision, because at all times relevant to DES's Section 401 determination for the proposed project, DES's Section 401 WQC rules were expired and, therefore, without legal effect. Accordingly, and for the further reasons set forth in CLF's June 30, 2005 Memorandum of Law, which CLF hereby incorporates by reference as if set forth herein, DES lacked authority to issue the Section 401 decision that is the subject of this appeal. In addition to the above, the Council's Decision & Order is procedurally deficient because, upon information and belief, the full Council did not participate in the October 28, 2005 decision in which it was held that DES had authority to grant the subject WQC despite the expiration of its rules.
3. The Council erred as a matter of law, and engaged in an unsustainable exercise of discretion, by ruling that during the hearing CLF could neither refer to, nor otherwise make use of in its examination of witnesses, evidence of a Section 401 decision issued by DES relative to another project. The Council's evidentiary ruling unfairly prejudiced CLF by precluding it from addressing evidence (1) that is highly relevant to and highly probative of the manner in which DES has considered Section 401 issues in the past, and (2) that was both part of DES's administrative record and specifically considered by DES in its decision-making process.
4. It is undisputed that the administrative record is devoid of baseline data relative to existing surface water conditions at and downstream of the subject site, as well as any modeling of pollutants that can be expected as a result of the proposed project. DES itself admits that requiring baseline data before issuance of a WQC is "[m]uch more defensible and protective of water quality," and "[f]rom a water quality standards standpoint . . . is the way to go." CLF Hearing Exhibit 16. It further admits that its approach of *not* requiring such baseline data means that "[m]onitoring that is really needed to make [a] defensible decision is not being required before the 401 is issued (ie,

it's after the fact)" and there are "[n]o quantitative analyses up front to justify that this [i.e., the proposed project] is an insignificant discharge per antidegradation regulations." *Id.* Absent baseline data and an analysis of pollutant effects from the proposed project, DES could not lawfully and reasonably determine that the proposed project will not result in a violation of state water quality standards, including antidegradation requirements. By affirming the subject WQC, the Council's determination to the contrary is erroneous as a matter of law.

5. The Council's decision is erroneous as a matter of law because it imposed an incorrect burden and standard of proof on CLF. The Council's decision states: "The Council finds that the Appellant failed to offer convincing evidence that water quality would actually be adversely affected by operation of the subdivision." Decision & Order at 4. At issue in this case is whether DES acted unlawfully, arbitrarily or capriciously in granting a Section 401 WQC. A WQC can be granted only if an applicant demonstrates, and DES finds, that a proposed project will *not* cause or contribute to a violation of water quality standards. In appealing this decision, CLF had a burden to establish only that DES acted unlawfully, arbitrarily or capriciously (such as by lacking certain data, or failing to consider certain impacts) in determining that the project will not result in water quality violations. Contrary to the Council's decision, CLF had no burden to affirmatively demonstrate that the project *will* adversely affect water quality. In addition to the above, the Council's decision is premised on the finding "that Dr. Burdick's extensive testimony did not provide facts or science to support with any certainty that water quality would be adversely affected by the operation of the subdivision." Decision & Order at 3. CLF had no legal burden to prove facts to a degree of "certainty." Rather, its burden was to prove *by a preponderance of the evidence* that DES acted unlawfully, arbitrarily or capriciously in granting the WQC. Env-WC 203.16.

6. The Council's decision relies on its characterization of witness testimony at the hearing. However, it completely ignores significant documentary evidence provided to the Council as exhibits. Such exhibits, which provide compelling evidence regarding the sensitivity of resources that are found on the site, and the impacts that can be expected as a result of the project, require the Council's review and consideration. *See*, for example, CLF Exhibits 4 through 15, 21 through 26. Absent such review and consideration, the Council cannot lawfully render a decision in this appeal.

7. The Council's decision is erroneous as a matter of law because it dismissed concerns relative to an Atlantic White Cedar community based on the fact that Atlantic White Cedar is "not a protected or endangered species." Decision & Order at 3. Contrary to the Council's decision, there is no statutory or regulatory provision limiting DES's review *only* to "protected or endangered species."

8. The Council's decision is erroneous as a matter of law because it dismissed Dr. Burdick's testimony on the bases "that [he] had never visited the site and that he relied solely upon information that was provided to him by the Appellant, not via his own research." Decision & Order at 3. Testimony at the hearing revealed that DES *itself*, as the *decisionmaker*, did not visit the site. Rather, DES premised its decision

based on information provided to it by the applicant. The Council's dismissive treatment of Dr. Burdick's testimony on the above-quoted grounds is unfair and entirely inconsistent with its upholding of DES's decision.

9. The Council's decision is erroneous as a matter of law because it is incorrectly and unfairly premised upon a decision of the N.H. Wetlands Council upholding DES's issuance of a wetlands permit for the proposed project. During the November 9 hearing, CLF specifically requested that the Council take official notice of the fact that in issuing a wetlands permit for the proposed project, DES had not considered the indirect impacts of the upland portions of the proposed development. The Council refused to take such official notice, stating that the wetlands decision was not at issue and was irrelevant. In sharp contrast to this ruling, the Council's decision dismisses the testimony of wildlife biologist Laura Deming by stating:

Ms. Deming voiced concern about vernal pools and the breeding of species that happen there in the spring. Cross-examination revealed that the reports about which she testified were prepared for an earlier NH Wetlands Council appeal of the issuance of a Wetland Permit, not for the NH Water Council appeal proceeding at issue. The issuance of the Wetlands permit was upheld by the Wetland Council.

Decision & Order at 3. Having ruled at the hearing that the wetlands permitting process was of no relevance, the Council erred, to the unfair prejudice of CLF, in relying upon such process in its decision. The Council further erred in dismissing the fact- and science-based opinions of Ms. Deming simply because they were not originally prepared in the context of the Section 401 process.

10. The Council's decision is erroneous as a matter of law because it is premised on a finding that Ms. Deming "offered no facts or science to support her statements." This characterization of her testimony is simply wrong and, furthermore, improperly ignores Exhibits 23 and 24.

11. The Council's decision is erroneous as a matter of law because it is based on the finding that "the developers seemed to be genuinely concerned about protecting the water quality as shown by their reduction of lots at an aggregate cost of approximately one million dollars when considering what the lots or completed homes would have brought in sale." Decision & Order at 4. The record is devoid of any competent evidence relative of any aggregate economic loss by the applicant. Moreover, such evidence (even if it existed), as well as any "genuine concern" the applicant may have with respect to water quality, is simply irrelevant as a matter of law to the subject of this appeal: whether DES could lawfully and reasonably conclude on the basis of the administrative record that the proposed project will not result in a violation of water quality standards.

12. The Council's decision is erroneous as a matter of law because it is based on a hearing that was conducted in a manner that was unfair and hostile to CLF; that

deprived CLF of its right to a fair evidentiary hearing under the Council's rules; and that deprived CLF of its due process rights under the New Hampshire Constitution. The hearing was conducted in a manner that imposed arbitrary time limitations, and that created a hostile environment, to the prejudice of CLF's right and ability to conduct a reasonable examination of witnesses, and to the prejudice of CLF's right to an impartial tribunal. It also was conducted in a manner that affirmatively sought irrelevant, incompetent, unsworn testimony to minimize CLF's issues on appeal and portray "the developer" as "genuinely concerned about protecting water quality" and suffering economic loss. Concerns regarding the conduct of the hearing have been raised by Council members themselves. Specifically, during the Council's December 14, 2005 meeting the Council considered a motion to recuse in another matter on the docket. During the Council's discussion of that motion, a Council member raised the subject of the November 9 hearing on CLF's appeal, stating: "I just wanted to talk a little bit about the last hearing we had as well, because I don't think it is just this particular docket, I think it's the behavior of the Hearings Examiner that appears prejudicial and bullying and unfair to the parties to the case." Water Council Meeting, 12-14-05, Tape 1 of 2, Side A. The Council member proceeded to state the important function the Council provides for the State in handling appeals, and that

we [i.e., the Council] need to create an open and fair environment where people can express themselves without feeling bullied or prejudiced or otherwise it's just a kangaroo court and there is really no purpose . . . and I think eventually lawyers such as – it could be the AG's office – is going to push for legislation to eliminate the Council because if we can't conduct a fair and impartial hearing I think then we lose one of our primary functions.

Id. The Council member stated his opinion that the chairman at the CLF-appeal hearing "got focused on constraining the time" and that "I think it's reasonable for us to set some time constraints but give them that ahead of time, but then let them make their case and not badger them or bully them while they are trying to do that." *Id.* Another Council member described the need for hearings to be conducted in the future in a less controlling manner. *Id.* In addition to these and other stated concerns, *id.*, statements at the Council's December 14 meeting indicate that at least two Council members felt allegiance to DES personnel (referring to them as "our staff" and "our people") and viewed CLF's appeal to be an attack on them. *Id.*, Side B. These statements demonstrate a misapprehension on the part of some Council members of the Council's role as an adjudicatory body, and a troubling lack of impartiality on their part. The significant deficiencies in the conduct of the November 9 hearing – as acknowledged by certain Council members themselves – precluded CLF from obtaining a proper adjudication of its appeal and warrant a rehearing of this matter.

WHEREFORE, the Conservation Law Foundation respectfully requests that the Water Council:

- A. Schedule a rehearing of this appeal, providing CLF an opportunity to fully and fairly present its case;

- B. Schedule a prehearing conference, allowing the parties and Council Chair to establish procedures that will allow for a fair and efficient hearing;
- C. Rule that CLF shall be permitted to use as evidence the DES Section 401 determination that was precluded from the hearing;
- D. Cure the deficiencies set forth in this motion and reconsider and reverse its Decision & Order; and
- E. Grant such other relief as it deems appropriate and just.

Respectfully submitted,
Conservation Law Foundation

By 

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CERTIFICATE OF SERVICE

A copy of this motion has this day been forwarded by first-class U.S. Mail to
Jennifer J. Patterson, Esq., and Malcolm R. McNeill, Jr., Esq.


Thomas F. Irwin